Supreme Court, U.S.
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No. 85-1820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JUNIOR RAY DUCKWORTH, et al.,

Petitioners,

vs.

GAYLE FRANZEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented for review are more properly stated as follows:

1. Whether senior corrections officials may be found liable under the Eighth Amendment for allegedly failing to anticipate an accident in the absence of any prior warning of harm?

2. Alternatively, whether the law was clearly established in 1979 that the alleged failure of senior corrections officials to anticipate an accident constitutes an Eighth Amendment violation in the absence of any prior warning of harm?

PARTIES TO THIS PROCEEDING

The petitioners are Junior Ray Duckworth, Michael A. Mullins, William Woodward, Daniel Hines, Freddie Brown, Emmett Leatherwood, Rudolph Moffett, Ben Cantrell and Robert Osborne.

The respondents are Gayle Franzen, in his capacity as Director of the Illinois Department of Corrections; Dennis J. Wolff, in his capacity as Warden of the Joliet Correctional Center; and Richard R. Hert, in his capacity as Chief of Security of the Joliet Correctional Center.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny petitioners' Petition for a Writ of Certiorari in No. 85-1820 seeking review of the Seventh Circuit's judgment on the Eighth Amendment issues in this case. The Court of Appeals opinion is reported at 780 F.2d 645 (1985).

(Separately, defendant Gayle Franzen and five other Department of Corrections defendants have petitioned this Court for a Writ of Certiorari in No. 85-1806 seeking review of the Seventh Circuit's judgment concerning the pendent state claims in this case.)

STATEMENT OF THE CASE

In their Statement of the Case, the prisoners omitted a number of significant facts. The following is a more complete summary of the evidence.

This case arose from an accidental fire aboard a maximum security over-the-road prison transport bus used by the Illinois Department of Corrections. One investigative report found that the fire was caused by a lit cigarette stuffed into one of the air vents in the prisoners' section of the bus. (R. 82a, Appendix 1). Another report concluded that the fire was caused by a defect in the air conditioning and ventilating system of the bus. (*id.*, Appendix 2). There is no allegation that any of the State of Illinois defendants were in any way responsible for the cause or spread of the fire.

The person in charge of the bus transfer on the day in question, November 29, 1979, was Lieutenant Larry Woods. His job was to design and implement the procedures for the bus transfer operation, personally supervise the inmate transfers, and report any problem in the transfer operation to his supervisors. Neither Lt. Woods (nor for that matter anyone else) ever reported any problem with the transfer operation to anyone. The plaintiffs never sued Lieutenant Woods.

Lt. Woods supervised three prison guards on the day in question, namely, defendants John Tipton, James Krug, and William Hartgrove. All three were highly experienced and had been involved in many inmate transfers. (Plaintiffs' Opening Brief in the Court of Appeals, p. 4). Defendant Tipton had also served as a part-time volunteer fireman for more than twenty years. (Tr. 203-204).

In addition to the three guards there were three other defendants: Gayle Franzen, Director of the Illinois Department of Corrections; Dennis Wolff, a prison warden; and Richard Hert, a security chief. Director Franzen headed a department of more than 7,000 employees and 13,000 inmates. (Tr. 872). As Director, he was not and could not be personally involved in each and every departmental activity. The undisputed evidence is that he had no involvement with any aspect of the bus transfer operation.

Defendant Wolff was the Warden of the Joliet Correctional Center. He had 400 to 500 employees working under his general supervision. (Tr. 155). Defendant Wolff was not responsible for supervising the bus transfer operation. The only personal involvement Warden Wolff had was to order that the over-the-road bus (similar to a Greyhound bus) be equipped with appropriate security modifications due to the long history of escapes from Illinois prison buses. (780 F.2d at 654). The security modifications selected were suggested by a private firm and were identical to those that the firm had previously placed on 14 United States Immigration & Naturalization Service buses. (Tr. 134, 136-137). Warden Wolff testified that his concern was to secure the bus, but not to make it unsafe. (Tr. 144). No one ever reported any problem concerning any aspect of the bus transfer operation to him.

Defendant Hert was in charge of security for the entire Joliet Correctional Center. In his position he oversaw a large staff of prison guards and intermediate supervisors. Security for the bus transfers was handled by a captain, two lieutenants, and several prison guards. (Tr. 161). Major Hert's administrative job did not include personal supervision of the bus operation. Major Hert testified that he had assigned two of his transfer bus lieutenants to draft a transfer bus security procedures manual.

These lieutenants, one of whom was Lieutenant Larry Woods, were the people most intimately familiar with the transfer bus procedures because the transfer of inmates was their daily work. (Tr. 167).

On the day in question, each prisoner was handcuffed to his seatmate and connected to a chain which ran between each pair of prisoners' handcuffs from the front to the back of the bus. The prisoners on the right side of the bus were placed on one chain and the prisoners on the left side of the bus were placed on another. Neither chain was connected to the bus in any manner, but rather slid up and down between the inmates through a ring between each set of cuffs. In order to prevent inmates from detaching themselves from the chain, a padlock was placed at the front end and a larger ring was placed at the back end of the chain. Two guards on the bus kept a key to the padlock as did the lieutenant in the follow car who directed and controlled the transfer. This arrangement permitted the prisoners on each side of the bus to get up quickly and walk off the bus together when told to do so by the guards, yet prevented the prisoners from running off in different directions if, for example, there was a need to have the prisoners leave the bus somewhere along the open highway. It also permitted the quick exit of pairs of inmates off the chain after the padlock was unlocked. (Tr. 187).

On November 29, 1979, after the bus had covered over two hundred miles that day without incident, smoke first appeared. Although not all of the witnesses agreed as to the precise time that smoke was first spotted in the bus, the majority testified that it was first detected after the bus had stopped at the Vandalia Correctional Center waiting to pick up new passengers. (Tr. 195). Within a very short period after initial detection, dark smoke came out

of the air vents and spread rapidly throughout the bus. (Tr. 197). Despite the smoke, however, there never was any fire in the passenger area of the bus.

Although there was minor disagreement in the testimony, the evidence was nonetheless clear that the prisoners on the right side of the bus got off the bus in a very short time all linked together on the chain. (Tr. 216). Indeed, the physical injuries claimed by the prisoners on the right side of the bus were either nonexistent or relatively minor. The prisoners on the left side of the bus for the most part, though, took longer to get off because they had panicked and rushed forward in disarray, tangling their chains in the process and not permitting the guards to get to the padlock to release the chain. Some inmates had to be carried out. All prisoners requiring medical care received immediate attention and there is no claim that the medical care received by the prisoners was inadequate.

The case went to the jury on two issues: (1) the prisoners alleged the transfer bus policies were not properly enforced on the day in question and (2) the prisoners alleged the transfer bus policies were inadequate. (Court's Jury Instruction No. 1). The jury exonerated the three prison guards who were responsible for enforcing the transfer bus policies on the day of the accident. The prisoners never sued the transfer bus lieutenants and their supervisor, the transfer bus captain, who were responsible for designing and implementing the transfer bus policies and who were most familiar with the transfer bus operation.

The jury instead found Director Franzen, Warden Wolff, and Security Chief Hert liable for inflicting cruel and unusual punishment upon the prisoners who happened to be on the bus that day, despite the fact that these three senior administrative officials were hundreds of miles

away from the bus on the day of the accident. The jury assessed the highest punitive damages against Director Franzen even though he had no involvement with any aspect of the transfer bus operation.

None of the defendants ever received any notice of any risk of harm. To the contrary, the bus with security modifications had been in operation for over 13 months prior to the date of the accident; there had been over 100 prior bus transfer trips all without any problem or incident. (Tr. 966). The security procedures and modifications were needed to prevent escapes, to prevent attacks on the bus driver, to prevent attacks on other prison employees and other prisoners, to prevent smuggling of weapons through open windows, and to prevent potential hostage situations. (Tr. 142, 183, 184, 444).

There had never before been a prison bus fire in Illinois or anywhere else. (780 F.2d at 653). Nor was the accident reasonably foreseeable. Plaintiffs conceded that the dense smoke which suddenly came out of the bus' air conditioning vents could not have been reasonably foreseen by any of the defendants (Plaintiffs' Opening Brief in the Court of Appeals, pp. 21, 30), much less these senior administrators who were in no way involved with the operation of the bus.

Although a few of the prisoners claimed that a guard prevented an inmate from leaving the bus after the fire started, the jury disbelieved the plaintiffs. And the plaintiffs did not appeal the jury's finding that the prison guards did not violate the Eighth Amendment.

The Court of Appeals held that Director Franzen, Warden Wolff, and Security Chief Hert did not violate the Eighth Amendment.

REASONS FOR DENYING THE WRIT

I.

THE ALLEGED FAILURE OF SENIOR ADMINISTRATIVE CORRECTIONS OFFICIALS TO ANTICIPATE A HIGHLY UNUSUAL ACCIDENT ABOARD A MAXIMUM SECURITY PRISON BUS IN THE ABSENCE OF ANY PRIOR WARNING OF HARM MAY NOT PROPERLY BE MADE THE BASIS FOR A FINDING THEY HAVE INFLICTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Plaintiffs spent the vast majority of their time at trial attempting to show that the prison guards assigned to the transfer bus on the day of the accident (i.e., defendants Tipton, Krug, and Hartgrove) failed to enforce the transfer bus policies and regulations and failed to promptly evacuate the prisoners from the bus. (Court's Jury Instruction No. 1). The jury rejected these claims by finding defendants Tipton, Krug and Hartgrove not liable; the prisoners did not appeal these verdicts.

Now that the jury has rejected the prisoners' claims that the guards failed to enforce the transfer bus procedures, plaintiffs argue that this case is really about the adequacy of those procedures. Gayle Franzen, Dennis Wolff and Richard Hert are the persons personally responsible for those procedures according to plaintiffs since they were the Director of the Department of Corrections, the Warden of the Joliet Correctional Center and its Security Chief, respectively. Yet plaintiffs assert nothing more than a *respondeat superior* theory of liability against these defendants. Plaintiffs contend that these three senior administrative officials had a global duty to "anticipate accidents" anywhere at anytime throughout the entire State when those accidents involve any of the 13,000 prisoners in the Department. (Plaintiffs' Opening Brief in the Court of Appeals, p. 25).

The prisoners contend that the bus transfer procedures were inadequate and that these senior supervisory defendants somehow should have known that purported fact. Plaintiffs further assert that these defendants are liable because "in the natural and probable sequence of events" "the risks were foreseeable." (*id.* p. 21).

But foreseeability cannot be proved with the benefit of hindsight even in the much less stringent context of a negligence lawsuit: "Nothing is so easy as to be wise after the event." W. Keeton, *Prosser and Keeton on Torts*, sec. 31, at 170 n. 16 (5th ed. 1984) quoting *Cornman v. Eastern Counties Railway Co.*, 4 H. & N. 781, 786, 157 Eng. Rep. 1050, 1052 (1859) (Bramwell, B.).*

Despite these arguments, however, plaintiffs declined to sue the very persons that had been personally responsible for both the drafting and the implementation of all the security procedures aboard the bus—the transfer Lieutenants. Rather, they sued Director Franzen, Warden Wolff and Security Chief Hert without a shred of evidence that these defendants had any awareness of any likelihood of harm to prisoners aboard the bus. The only evidence in the record is that prior to the installation of the security modifications on the bus violent felons had escaped; one prisoner had climbed right out the window. (Tr. 142, 184). The undisputed record further shows that as of the day in question, November 29, 1979, the security modifications and fire safety procedures used in prison transfers

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* Defendants, of course, in no way concede that they were negligent. The security modifications at issue here were absolutely essential for the safety of the residents of Illinois, Department of Corrections personnel, and the prisoners themselves. Moreover, plaintiffs failed to show that as of November 29, 1979, the day in question, that any corrections department anywhere in the country had any better bus transfer procedures in effect for the long-distance transfer of violent felons.

had been in use for over 13 months and that over 100 trips had been made without incident. (Tr. 966). The accident in question was the first prison bus fire in the history of not only the State of Illinois, but the nation. (780 F.2d at 653).

There is not a single Eighth Amendment case which holds state officials liable on the prisoners' novel "should-have-known" standard. In every Eighth Amendment case where liability was imposed, the defendants had actual notice of the potential for harm.

Indeed, in their Petition for Certiorari in this case, the prisoners acknowledge that *Estelle v. Gamble*, 429 U.S. 97 (1976) sets forth the proper Eighth Amendment standard. In particular, the plaintiffs argue that although the Seventh Circuit cited *Estelle v. Gamble*, the Court of Appeals allegedly failed to follow its teaching. (Plaintiff's Petition for Certiorari, pp. 6-10).

In *Estelle v. Gamble*, however, this Court specifically rejected the very theory that the prisoners rely upon in this case—that Eighth Amendment liability may be imposed upon prison officials on the basis that defendants arguably should-have-known better. In *Estelle*, this Court accepted as true plaintiff's claims that he failed to receive proper medical treatment for his back injury for which he was experiencing daily pain and suffering. (*id.* at 107). The prison doctors told plaintiff that he was in "first class" medical condition despite his disabling back injury. (*id.* at 101). Nevertheless, this Court dismissed plaintiff's claim against the prison medical director. (*id.* at 108). Following this Court's reasoning, the Court of Appeals on remand dismissed as a matter of law plaintiff's claims against the Director of the Department of Corrections and the prison warden. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir.), *cert. denied*, 434 U.S. 974 (1977).

In describing the appropriate Eighth Amendment standard, this Court gave as an example of deliberate indifference the outright refusal to provide medical treatment as well as the injection of penicillin with knowledge that the prisoner was allergic and refusal of the doctor to treat the subsequent allergic reaction. See 429 U.S. at 104 n. 10 citing *Thomas v. Pate*, 493 F.2d 151, 158 (7th Cir.), *vacated and remanded on other grounds, Cannon v. Thomas*, 419 U.S. 813 (1974). The *Thomas* decision was expressly relied upon by the Seventh Circuit in this case. (780 F.2d at 653).

In holding that an allegation of inadequate medical treatment does not state an Eighth Amendment claim (429 U.S. at 105), this Court stated (*id.* at 107):

> "[T]he question whether an X-ray—or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court."

More particularly, an accident as happened in this case, is not actionable under the Eighth Amendment (*id.* at 105):

> "An accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain."

The instant case is much weaker for plaintiffs than *Estelle* in that in *Estelle* the prisoner himself gave notice of the claimed harm. In this case, there was absolutely no notice given by anyone.

Although plaintiffs acknowledge that this Court in *Whitley v. Albers*, 475 U.S. ____, ____, 106 S.Ct. 1078, 1085 (1986) expressly approved the Seventh Circuit's deci-

sion in this case, plaintiffs characterize such approval as "unfortunate[ ]." (Plaintiffs' Petition for Certiorari, p. 9).

Moreover, despite plaintiffs' contention that the Seventh Circuit engaged in "a shocking and incomprehensible piece of improper judicial activism" (*id.*, p. 11), it is the plaintiffs who seek to create an Eighth Amendment standard of liability wholly without precedent. Under plaintiffs' theory, senior corrections officers may be found guilty of inflicting cruel and unusual punishment upon prisoners who are unknown to them based upon a standard of absolute liability for the acts of subordinates in the absence of any prior warning of harm.

The handful of cases cited by plaintiffs (*id.*, pp. 7-9) are clearly not in conflict with the Seventh Circuit's decision in this case; to the contrary, they are in complete accord with this decision. In *Roberts v. City of Troy*, 773 F.2d 720, 722, 725 (1985) the Sixth Circuit held that a police chief's failure to promulgate and enforce procedures sufficient to prevent prisoner suicides does not amount to an Eighth Amendment violation. Similarly, in *Anderson v. City of Atlanta*, 778 F.2d 678, 688-89 (1985), the Eleventh Circuit granted judgment notwithstanding the verdict in favor of the Director of the Atlanta Bureau of Corrections in a case where an inmate died in his prison cell. In *Miller v. Solem*, 728 F.2d 1020 (8th Cir.), *cert. denied*, 469 U.S. ____ , 105 S.Ct. 145 (1984) the Court of Appeals granted summary judgment in favor of all prison officials in an inmate-on-inmate assault case. Finally, in *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3866 (7/7/86) and *Riley v. Jeffes*, 777 F.2d 143, 146 (3d Cir. 1985) the record and the pro se prisoner's complaint, respectively, made clear that defendants had received prior notice that the plaintiff had been or likely would be harmed.

Thus the Seventh Circuit's decision in this case is completely consistent not only with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976) but also every other appellate decision as well. Under these circumstances, the Seventh Circuit properly granted judgment notwithstanding the verdict in favor of defendant senior administrative corrections officials. *United States v. Generes*, 405 U.S. 93, 106-107 (1972) (judgment notwithstanding the verdict in favor of defendant granted by this Court); *Neely v. Eby Construction Co.*, 386 U.S. 317, 326, 329-30 (1967) (affirmed entry by Court of Appeals of judgment notwithstanding the verdict in favor of defendant).

More particularly, as part of the prisoners' newly conceived claim that the Seventh Circuit applied an incorrect standard of law, they assert that under such a standard they should be permitted to get into evidence the post-remedial acts taken by the Illinois Department of Corrections. (Plaintiffs' Petition for Certiorari, p. 10). But Rule 407 of the Federal Rules of Evidence makes plain that subsequent remedial measures are not admissible. Moreover, in *Rhodes v. Chapman*, 452 U.S. 337, 348 n. 13 (1981) this Court noted that opinions of experts as to appropriate conditions of prison confinement do not establish the requisite Eighth Amendment standard.

Finally, although there were conflicts in the testimony concerning the alleged acts or omissions of the prison guards (whose nonliability is not before this Court) there was no dispute with respect to any fact issue relating to the Director, Warden, or Security Chief. Plaintiffs presented no evidence to contradict anything these three defendants said. Most significantly, the prisoners point to no evidence that any of these three senior administrative officials had any prior warning of harm. Indeed, the evidence was just the opposite. The undisputed testimony

is that as of the day in question, November 29, 1979, the security modifications and fire safety procedures used in the prison bus transfer program had been in use for over 13 months and that over 100 trips had been made without incident. (Tr. 851-852, 966). Significantly, the prisoners concede as much by arguing that these three senior administrative officers had a duty to "anticipate accidents" anywhere at anytime throughout the entire State which might affect any of the Department's 13,000 prisoners. (Plaintiffs' Opening Brief in the Court of Appeals, p. 25). In particular, the prisoners argue that the Eighth Amendment renders the Director responsible for the acts or omissions of the 7,000 subordinate employees in the Department of Corrections despite the total absence of any prior notice of risk of harm. (Tr. 872).

Consequently, there are no conflicting facts or credibility issues concerning the alleged Eighth Amendment liability of the Director, the Warden, and the Security Chief. The Seventh Circuit clearly reached the correct result in granting judgment notwithstanding the verdict in favor of Director Franzen, Warden Wolff, and Security Chief Hert.

II.

ALTERNATIVELY, DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY FROM LIABILITY FOR MONEY DAMAGES.

No court has ever ruled that the alleged failure of senior corrections officials to have their subordinates promulgate adequate procedures so as to anticipate a highly unusual accident aboard a maximum security over-the-road prison bus constitutes an Eighth Amendment violation in the absence of any prior warning of harm. *A fortiori,* as of November 29, 1979, the date of the accident, the law was not clearly established that the foregoing conduct purportedly consti-

tuted an Eighth Amendment violation. Accordingly, defendants Franzen, Wolff, and Hert are entitled to qualified immunity from money damage liability. *Mitchell v. Forsyth*, 472 U.S. ____, ____, 105 S.Ct. 2806, 2818-20 (1985).

CONCLUSION

The Seventh Circuit's decision to grant judgment notwithstanding the verdict is fully consistent with this Court's Eighth Amendment holding in *Estelle v. Gamble*, 429 U.S. 97 (1976). Moreover, the defendants are entitled to qualified immunity from damage liability.

Accordingly, the Petition for Writ of Certiorari in No. 85-1820 should be denied.

(Separately, defendants' Petition for Writ of Certiorari in No. 85-1806 which concerns the pendent state claims should be granted for the reasons set forth in that Petition.)

Respectfully submitted,

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